Data Monitor Systems, Inc. *and* Teamsters Local Union No. 957, General Truck Drivers, Warehousemen, Helpers, Sales and Service and Casino Employees. Case 09–CA–145040

May 31, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On January 19, 2016, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[2]

The primary issue in this case is whether the Respondent was a "perfectly clear" successor under *NLRB v. Burns Intl. Security Services,* 406 U.S. 272, 294–295 (1972), and *Spruce Up Corp.,* 209 NLRB 194, 195 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), with an obligation to bargain with the Union prior to setting initial terms and conditions of employment that differed from those under the predecessor's collective-bargaining agreement with the Union. For the reasons discussed below, we find, in agreement with the judge, that the General Counsel failed to prove that the Respondent was a "perfectly clear" successor as alleged in the complaint.

Facts

The Respondent is a federal contractor that was awarded a contract to provide supply and transportation services at Wright Patterson Air Force Base in Fairborn, Ohio, replacing WSI All Star, LLC. WSI had collective-bargaining agreements (CBAs) with the Charging Party Union covering its maintenance, transportation, supply, and personal property employees. These CBAs required that seniority be used in deciding which employees to lay off and how to assign hours of work.

The Respondent won the federal contract on July 18, 2014.[3] The contract provided for a transition period from August 1–31, during which the Respondent was to become familiar with Base operations and interview and hire employees. The Respondent began operational performance on September 1.

The Respondent asked WSI to distribute employment applications to WSI employees and to set up an initial schedule for interviews with the Respondent. In late July or early August, WSI project managers informed employees that WSI had lost the contract, that the Respondent would be taking over the contract effective September 1, and that those interested in working for the Respondent could obtain employment applications from WSI. Employees were also told that the Respondent would be conducting employment interviews on August 6, 7 and 8, and that they should sign up for a specific time and complete their applications by that time.[4]

The interviews were conducted as scheduled in early August. At the conclusion of each interview, the Respondent told applicants that they would be hearing from the Respondent shortly as to whether they would be offered employment. The Respondent interviewed all WSI employees who signed up for an interview and ultimately offered employment to 60 of approximately 90 WSI employees.

On August 8, Donald Minton, the Union's business agent, met with three of the Respondent's managers, including James Gustafson, the Respondent's president and owner. During this meeting, Gustafson told Minton that the Respondent was not going to hire the same number of people that were then employed by WSI. When Minton asked whether the Respondent was going to use seniority in determining who to hire, Gustafson replied that the

[1] The Charging Party excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to provide the Union with requested information.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). We shall substitute a new notice to conform to the Order as modified.

[3] All dates are in 2014 unless otherwise indicated.

[4] WSI employees interested in continuing employment with the Respondent were given an application packet that consisted of a cover sheet, list of positions, application, and acknowledgement form. The cover sheet stated that the packet also included five forms related to EEO law, Veteran status, disability and affirmative action identification, and "Employers Holding Federal Contracts or Subcontracts." Of these forms, only the EEO form was entered in the record as an exhibit.

Respondent was going to hire the best applicants it could find and that seniority would not be used in deciding which WSI employees to retain.

Although not mentioned by the judge, there is no dispute that the Respondent was subject to Executive Order 13495, Non-Displacement of Qualified Workers (E.O. 13495), which requires contractors awarded a federal government service contract to offer a right of first refusal of suitable employment to those (nonmanagerial and nonsupervisory) employees whose employment will be terminated as a result of the award of the successor contract. See 74 Fed.Reg. 6103 (2009).[5] E.O. 13495 states that a successor contractor may employ fewer employees than the predecessor, that the successor must offer the right of first refusal only to the number of eligible employees that it believes necessary to meet its anticipated staffing pattern, and that the successor (subject to certain restrictions not applicable here), "will determine to which employees it will offer employment." See 29 CFR §9.12(d)(1)(i) & 9.12(d)(2).

The complaint alleges that the Respondent became a "perfectly clear" successor to WSI when the Respondent had WSI distribute application packets to WSI unit employees without a simultaneous announcement of changes to existing terms and conditions of employment. The complaint further alleges that the Respondent failed to utilize seniority when laying off unit employees and when assigning hours of work to the unit employees, thereby changing terms and conditions of employment without giving the Union notice and the opportunity to bargain.

Discussion

The judge found that the Respondent was not a "perfectly clear" successor because the Respondent indicated to the Union that it did not intend to hire all of WSI's employees and because the Respondent told applicants that they would hear shortly from the Respondent as to whether they would be hired. The judge found that this communication would lead applicants to infer that the Respondent was not going to adopt the terms and conditions of WSI's CBAs with the Union. Because the Respondent was not a "perfectly clear" successor, the judge found that it did not violate the Act by refusing to use seniority in determining whom to employ.

The General Counsel and the Charging Party except to the judge's findings and argue that the Respondent was a "perfectly clear" successor whose bargaining obligation attached in late July when, through WSI, it invited WSI employees to submit job applications. The General Counsel argues that distributing applications and inviting employees to sign up for interviews was the same method that all prior successor employers had utilized, without disruption in service delivery or employment, and that employees understood the process to be routine and that their employment would continue uninterrupted. The General Counsel argues that, in the context of the "historical practices with various successor employers" and the obligations imposed by E.O. 13495, the Respondent's invitation to WSI employees to submit applications was "essentially" a job offer.

Under *NLRB v. Burns Security Services*, supra, 406 U.S. at 281–295, a successor is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms and conditions of employment unilaterally. The Court explained that the duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident whether the union will retain majority status in the new work force until after the successor has hired a full complement of employees. Id. at 295. The Court recognized, however, that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Id. at 294–295.

In *Spruce Up Corp.,* supra, the Board interpreted the "perfectly clear" caveat in *Burns* as "restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." 209 NLRB at 195 (footnote omitted).[6]

In subsequent cases, the Board has clarified that, although the Court in *Burns*, and the Board in *Spruce Up*, spoke in terms of a "plan[] to retain *all* of the employees in the unit" (emphasis added), the relevant inquiry is whether the successor "[p]lanned to retain a sufficient number of predecessor employees to make it evident that the Union's majority status would continue" in the new work force. *Galloway School Lines*, 321 NLRB 1422, 1426–1427 (1996); *Spitzer Akron, Inc*., 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977). See also *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 3 (2016); *Hos-*

[5] The Department of Labor's rules relating to administration of E.O. 13495 are codified at 29 CFR § 9.1 et seq.

[6] The General Counsel and the Charging Party request that the Board overrule *Spruce Up*. We decline to rule on this issue at this time.

pital Pavia Perea, 352 NLRB 418, 418 fn. 2 (2008), incorporated by reference 355 NLRB 1300 (2010).[7]

Applying the above principles to the facts of this case, we find that the Respondent did not become a perfectly clear successor when it (through WSI managers) informed employees that those interested in working for the Respondent should obtain and complete an application and sign up for an interview with the Respondent.[8] We find that the Respondent's distribution of applications to WSI employees was not the equivalent of an invitation to accept employment, as argued by the General Counsel. We also find that the Respondent did not "either actively or, by tacit inference" mislead employees into believing they would be retained without changes in their wages, hours, or terms and conditions of employment. *Spruce Up*, supra, 209 NLRB at 195.

The record shows that, at the time the Respondent invited WSI employees to obtain applications and sign up for an interview, the Respondent was in the preliminary stages of its hiring process and had not yet decided which WSI employees it intended to hire.[9] The application packets themselves reflected that the Respondent had not yet made hiring decisions. The documents in the application package stressed individuals' status as "applicants,"[10] and did not in any way indicate that simply completing the application was sufficient to guarantee employment with the Respondent.[11] Further, the WSI managers who distributed the application packets did not indicate that completing an application was the only hiring requirement imposed by the Respondent. In fact, WSI employees were told that employees interested in retaining their employment had to sign up for an interview time, indicating to employees that the Respondent was in preliminary stages of the transition process and had not yet decided which employees to retain.[12] In short, there was nothing about the application packets or the Respondent's associated conduct that suggested that completing the applications was simply an administrative formality that would ensure continued employment. Compare *Cadillac Asphalt*, 349 NLRB at 10 (successor expressed intent to hire predecessor's employees when it asked employees to complete applications and W-4 forms "to update [successor's] records"); *Canteen Co.*, 317 NLRB 1052, 1053 (1995) (finding successor "perfectly clear" where it "effectively and clearly" communicated its plan to retain employees). The Respondent simply invited incumbent WSI employees to apply without stating or otherwise indicating that completing applications would guarantee employment. Because it did not, in any way, communicate or demonstrate an intent to retain the employees, the Respondent was under no obligation at that point to make a simultaneous announcement of its intent to change terms and conditions of employment in order to avoid "perfectly clear" successor status. Compare *Hilton's Environmental*, 320 NLRB 437, 437–438 (1995) (finding "perfectly clear" status where successor solicited applications from incumbent employees and stated it intended to hire all employees without making clear announcement that it intended to establish new terms and conditions of employment).

Contrary to the General Counsel, we further find that the obligations imposed by E.O. 13495 do not warrant a contrary result in the circumstances presented here.[13]

[7] For this reason, the judge's finding that the Respondent was not a "perfectly clear" successor because it did not intend to hire all of WSI's employees was an error. We also do not rely on the judge's citation to *Paragon Systems, Inc.*, 362 NLRB No. 166 (2015), in his "perfectly clear" successor analysis. The issue in *Paragon* was whether Paragon lawfully implemented a particular unilateral change as part of its initial terms and conditions of employment, but the General Counsel did not allege that Paragon was a "perfectly clear" successor. See id., slip op. at 2, 6–7.

[8] Unlike the judge, we do not consider the communications that the Respondent made to the Union on August 8 or to applicants at their interviews because the General Counsel alleges that the Respondent become a "perfectly clear" successor prior to these communications.

[9] The Respondent made its decision about the number of employees it viewed as necessary for its operations when it submitted its bid for the contract. After being awarded the contract, the Respondent was informed of the number of bargaining-unit employees currently employed by WSI and determined that it would not hire the entire complement of WSI employees.

[10] For example, the cover sheet explained that the Respondent would be "interviewing applicants" and stated that it included forms necessary to "complete the application process." The packet also included an acknowledgement form that individuals were required to sign. The form included statements that the individual understood that "as an applicant for a position with this company," the individual must demonstrate that he or she is capable of performing tasks which are pertinent to the job and attesting that the individual is "a genuine applicant for employment."

[11] The Respondent did not distribute or ask applicants to complete any forms, such as W-4s, suggesting that the Respondent had already decided which applicants to hire. Compare *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 11 (2007).

[12] Contrary to the General Counsel's assertion, no employee testified that any prior contractor had conducted interviews with the predecessor's employees prior to beginning operations.

[13] As the Board explained in *GVS Properties, LLC*, employers subject to "worker retention" statutes such as E.O. 13495 can avoid "perfectly clear" successor status by announcing new terms and conditions of employment prior to or simultaneously with the expression of intent to retain their predecessors' employees, consistent with the requirements of *Spruce Up*, supra. See 362 NLRB No. 194, slip op. at 5–6 (2015).

The judge did not mention E.O. 13495 in his analysis, but elsewhere in his decision he stated that, "[w]hether or not the Respondent violated [E.O. 13495] or the DOL regulations, is not for me or the Board to decide. If the Union feels that the Order or the regulations have been violated, it should refer the matter to the DOL." The General Counsel and the Union both except to these statements. While the judge may have erred in failing to discuss the implications of E.O. 13495 in his

Although the Respondent had a legal obligation to offer WSI employees the right of first refusal of suitable employment, E.O. 13495 allows for successors to hire fewer employees than their predecessors had employed and gives successors the authority to choose which employees to hire.[14] As discussed above, at the time the applications were distributed to WSI employees, the Respondent had not yet determined which WSI employees it was going to offer the right of first refusal. Nor did it know which employees, if any, would accept jobs once offers were made. Given these facts, the Respondent's distribution of application packets and its invitation to WSI employees to apply cannot be viewed as the equivalent of affirmatively offering employees the right of first refusal. Again, the Respondent's actions reflected the fact that it had not yet made its hiring decisions and did not express an intent to retain WSI's employees.

Although there is no evidence that WSI employees knew of the Respondent's legal obligations under E.O. 13495, some former WSI employees testified that they had been through transitions from one contractor to another before and that prior contractors had decided which employees to retain based solely on seniority. This testimony suggests that some employees might have believed that the Respondent would decide which employees to retain based purely on seniority considerations, as prior contractors had done. However, this mistaken impression was not the result of any affirmative action by the Respondent.[15] Further, we do not think that employees could reasonably conclude they would be retained when the Respondent required that employees sign up for an interview time, a requirement that no prior contractor had imposed.

In sum, we find that at the time the job applications were distributed by WSI, the Respondent had not yet made its hiring decisions and did not express an intent to retain a majority of WSI's employees. Accordingly, the Respondent did not forfeit its right to unilaterally set initial terms and conditions of employment.

Because we find that the Respondent was not a "perfectly clear" successor as alleged in the complaint, we, like the judge, dismiss the allegations that the Respondent violated Section 8(a)(5) and (1) by failing to utilize seniority with regard to the layoff of employees and the assignment of hours of work.

analysis, his statement that the Department of Labor is charged with overseeing compliance with E.O. 13495 and its associated regulations is correct. See 29 CFR §§ 9.21–9.24 (2013).

[14] There are a limited number of exceptions that are not applicable here.

[15] Nor was it a requirement imposed by E.O. 13495 which, as mentioned above, allows successors to determine to which employees it will offer employment.

ORDER

The National Labor Relations Board orders that the Respondent, Data Monitor Systems, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Teamsters Local Union No. 957, General Truck Drivers, Warehousemen, Helpers, Sales and Service and Casino Employees by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner the information requested by the Union on September 15, 2014.

(b) Within 14 days after service by the Region, post at its facilities at the Wright Patterson Air Force Base in Fairborn, Ohio, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 15, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[16] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. May 31, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Teamsters Local Union No. 957, General Truck Drivers, Warehousemen, Helpers, Sales and Service and Casino Employees (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely manner the information requested by the Union on September 15, 2014.

DATA MONITOR SYSTEMS, INC.

The Board's decision can be found at www.nlrb.gov/case/09–CA–145040 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Julius Emetu, Esq. and *Eric Brinker, Esq.,* for the General Counsel.
John Doll, Esq. (Doll Jansen & Ford), for the Charging Party.
Robert Norman, Esq. (Cheek & Falcone, PLLC), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on December 2 and 3, 2015, in Cincinnati, Ohio. The complaint, which issued on August 26, 2015, and was based upon an unfair labor practice charge filed on January 23, 2015, by Teamsters Local Union No. 957, General Truck Drivers, Warehousemen, Helpers, Sales and Service and Casino Employees, herein called the Union, alleges that Data Monitor Systems, Inc., herein called the Respondent, was awarded a contract by the Department of the Air Force effective September 1, 2014,[1] to provide supply and transportation services at Wright Patterson Air Force Base, herein called the Base, replacing WSI All Star, LLC, herein WSI, which had a contract with the Union, the exclusive collective-bargaining representative of the unit employees. It is alleged that since that date, the Respondent has continued as the employing entity and is a successor, and/or a perfectly clear successor to WSI and that on about August 13, the Respondent failed to utilize seniority when laying off unit employees, and in assigning hours of work to the unit employees, without prior notice to the Union, resulting in the Respondent laying off eleven named employees and assigning seven named employees to part-time positions, in violation of Section 8(a)(1)(5) of the Act. It is further alleged that the Respondent failed to provide the Union with relevant and necessary information that it requested on about September 15, also in violation of Section 8(a)(1)(5) of the Act.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6),

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2014.

and (7) of the Act and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

Pursuant to its contract with the Air Force, WSI provided supply and transportation services for the Air Force at the Base until about September 1. WSI had four identical collective-bargaining agreements with the Union covering its maintenance employees, its transportation department employees, its supply department employees and its personal property employees. These agreements were effective for the period October 1, 2013, through September 30, 2014.

John Sook, the senior vice president of the Respondent, is involved in the bidding process for new contracts as well as the startup of contracts that the Respondent is successful in obtaining. The Respondent put in a bid for the contract to perform the work that WSI had been performing at the Base and was awarded the contract on about July 18 to be effective August 1; the transition period for the Respondent to become familiar with the Base operation and to interview and hire employees was August 1 through 31. The Respondent contacted the WSI project manager and asked him to distribute employment applications and to set up an initial schedule for employment interviews with the incumbent employees for the Respondent. He testified: "That's a common courtesy that's done throughout the industry."

In late July or early August, the employees were told by their project managers that WSI had lost the contract at the Base, that the Respondent would be taking over the contract effective September 1, and those interested in working for the Respondent could obtain employment applications from his secretary. They were also told that the Respondent would be conducting employment interviews in the area on August 6, 7, or 8, and that they should sign up for a specific time and to complete their employment applications by that time.

The interviews were conducted individually by Sook, James Gustafson, president and owner of the Respondent, and Harvey Watson, vice president of operations, at a hotel near the Base on August 7. Roxanne James, who was number two in seniority in her department, was interviewed by Sook; he asked her about her work and her family and whether she had any questions for him, and she said that she didn't. They shook hands and he said that the company would be sending letters out in a few days. Dorothy Washington was interviewed by Gustafson on August 7; he asked her about her job qualifications and what she did during her leisure time. She asked him if the Respondent would be hiring by seniority and she testified that he said that he didn't know at that time, but that they would be looking at qualifications. Debra Nichols was interviewed by Gustafson on August 7; he asked her about her experience and she told him about the work that she performed. At the conclusion of the interview, he told her that she would be receiving a letter stating whether they would be hiring her.

Michael Hardin was interviewed on August 8 by Gustafson, who asked him about his work experience as well as some other questions. He also asked Hardin if he had any questions for him, and at the conclusion of the interview, Gustafson told him, "We'll be sending out notification letters to inform you whether or not you've got a job." James Williams was interviewed by Sook; he explained his qualifications and that he had been employed at the facility since 2004. Sook told him that he would be receiving a letter from the company in the mail. James Beaver was interviewed by Sook, who asked about his background and what work he performed at the Base. Beaver told him of his background and work experience. At the conclusion of the interview, Sook told him that he would receive notification from the company by mail. Thomas Franjesevic was interviewed on August 6 by Watson, who asked him to tell him something about himself and Franjesevic told him about the work that he had performed for WSI and that he was good at what he did. Watson asked if he had any questions for him and he said that he didn't. The interview lasted about ten minutes, they shook hands and he left. Other than Washington, none of the applicants were told that there would be any change in the terms and conditions of employment or whether seniority would be used in selecting employees for employment. On about August 13, each of these applicants received a letter from the Respondent saying that they would not be offered employment at that time.

Sook testified that interviews were scheduled for the evening of August 6 through the morning of August 8 for the WSI employees who were interested in continuing their employment at the facility with the Respondent. Based upon their bid, the Respondent knew that they would require fewer employees than were employed by WSI and, therefore, they would not be hiring all of the WSI employees. For each of the employees interviewed, he, Gustafson, and Watson employed general interview questions that was generated by the company and scribbled notes on the applicant's response. At the conclusion of each interview:

> We told them that we're taking all the interviews today, nobody is being hired today. What we're doing is we're going to try to make an assessment of the personnel that are available for inteviews relative to the positions in the organization, that we would be back in touch with them as soon as possible to know whether or not we were going to be able to offer them employment . . .

At the conclusion of the interviews, Gustafson told Sook and Watson that one applicant, Washington, asked him if seniority would be employed in the hiring process and he told her that seniority was not being used because they were going to be employing fewer people than the incumbent workforce. Gustafson testified that the company's HR Department gave them a list of ten questions to ask the applicants, and he followed that pattern. He specifically remembered interviewing Washington because she repeatedly asked him if they were going to hire by seniority, and he responded, "No, we are going to hire based on qualifications, who we felt the best were because we don't have to hire by seniority. We don't have jobs for everybody at that site." He told all those that he interviewed that they were going to offer employment to the best people they can find. While the Respondent interviewed all WSI employees who were interest-

ed in working for the Respondent, it initially offered employment to sixty of approximately ninety WSI employees.[2]

On July 23, Donald Minton, business agent for the Union, received notification from the Air Force that the Respondent had been awarded the contract to service the Base. On July 24, he called Watson and told him that he had learned that they had obtained the contract and asked him for dates for negotiations, but Watson replied that he wasn't willing to set up dates yet because they had not received anything in writing from the Air Force. Minton then wrote to Watson requesting that he contact him to set a date prior to the takeover date for them to negotiate a contract for the employees at the base. Watson did not reply to this letter. Minton first met Gustafson, Sook and Watson at the Union hall in Dayton on August 8. He told them that he would like to schedule dates for the parties to meet and bargain about a contract and Gustafson told him that they service other Air Force bases and that they have contracts with Teamster unions in New Mexico and Oklahoma. He also told Minton that they were not going to hire the same number of people that were presently employed by WSI and Minton told him that WSI had recently rehired twelve "junior people" who were laid off by seniority about 6 months earlier. Minton testified that there was no discussion of whether the Respondent was going to hire employees by seniority or any discussion of the employee interviews that the Respondent had conducted on the prior days.

Sook testified that at this meeting, they told Minton that they had been interviewing employees and they recognized the need to bargain with the Union for a new contract. Minton asked if they had completed interviewing employees and they said that they had. Minton then asked if seniority was going to be used in determining who would be hired and they said, "that they were going to hire the best qualified candidates, that we were hiring less than the total incumbent workforce." When asked again what the response was to Minton's question, Sook testified, "His answer was no, we are not using seniority as a basis because we're hiring less than the full workforce out there." Gustafson testified that after they had completed the interviews, they met with Minton in his office on August 8. After the introductions, Gustafson told him that some people had called him asking about seniority, and Minton asked whether Dorothy Washington was one of those people. Minton then asked if the company was going to hire by seniority and Gustafson said no, that they were going to hire the best applicants that they could find because they didn't have jobs for everybody, and that their bid was for fewer people than had been employed by WSI. They discussed dates to meet to negotiate a new contract, and left. On August 12 and August 13, Minton sent emails to Gustafson asking for copies of the employment or non-employment letters that were sent to the applicants; he testified that he "eventually" received this information. Beginning shortly after August 13, when the Respondent's letters of employment and non-employment are dated, Minton received telephone calls from some of the applicants saying that they had received a letter from the Respondent saying that they were not being hired. As some of these applicants were high on the WSI seniority list, he called Gustafson and told him that he can't violate seniority in hiring, and Gustafson told him that he could hire whomever he chooses.

On August 19, Minton sent Gustafson an email stating: "Please sign extension agreement, date and return to me by email:"

> Dear James:
>
> 1. The parties will adhere to all the terms and conditions of the current Collective Bargaining Agreement and agree to an extension period of six (6) months ending March 31, 2015: and
>
> 2. The Employer will retro any wages and benefits back to the expiration date of the current Collective Bargaining Agreement; and
>
> 3. The Company will continue to negotiate in good faith during this period of an extension.

Minton signed the agreement and there was a line for Gustafson to sign as well. On August 21, Gustafson emailed Minton telling him that his attorney was reviewing the extension agreement. Later that day, Minton emailed Gustafson saying, "I thought you told me if I took out number 2 on first extension you would be ok to sign it and send back to me. Please advise." Gustafson responded two hours later: "I sent it over to the attorney as he wanted to see it. I'm still waiting on his response." The Extension Agreement, as signed by Minton and Gustafson on August 29, states:

> 1. Effective as of the date of the last signature below, the parties will adhere to all the terms and conditions of the current Wright Patterson Air Force Base Collective Bargaining Agreements between WSI All Star LLC and Teamsters Local Union No. 957, and agree to an extension period of six (6) months ending March 31, 2015;
>
> 2. Nothing in this letter shall be construed to retroactively bind Data Monitor System, Inc. to the terms and conditions of the current Collective Bargaining Agreements; and
>
> 3. The parties shall continue to negotiate in good faith during this period of an extension.

Gustafson testified about why he did not sign the extension agreement that Minton sent him on August 19:

> Because I know that once I sign that, that I have to follow the terms and conditions of that contract, and I know that before that happens, I have the right to choose who I'm going to hire because I'm not going to hire all the employees. I don't have to follow seniority, so I wait until I get that all settled and done before I sign that.

He testified that he does not recall whether he and Minton had any discussions about the terms of the extension agreement. Prior to signing the extension agreement on August 29, all of the interviews had taken place and the employment letters had

[2] The WSI seniority list contains the names of ninety employees in the four departments and there were sixty employment offer letters sent out as well as ten non-employment letters.

gone out. The parties entered into collective-bargaining agreements effective from December 22, 2014, through August 31, 2018 covering the unit employees.

There is a disagreement among the parties regarding Executive Order 13495 and Department of Labor regulations as to the obligations of a successor employer in selecting employees. Whether or not the Respondent violated this Executive Order, or the DOL regulations, is not for me or the Board to decide. If the Union feels that the Order or the regulations have been violated, it should refer the matter to the DOL.

The complaint also alleges that the Respondent refused to provide the Union with the information that it requested on about September 15, which was necessary for, and relevant to, the Union as the collective-bargaining representative of the Respondent's employees, in violation of Section 8(a)(1)(5) of the Act. Minton testified that after he was informed by employees who were high on the seniority lists that they had not been offered employment by the Respondent and that others with less seniority had been offered employment, he called the Respondent and spoke to Frank Anderson, Respondent's project manager at the Base and told him that the Respondent should have laid off the least senior employees and Anderson replied that the Respondent had the right to hire anybody that it wanted. Minton had all those who had not been offered employment out of seniority (Franjesevic, Williams, Hardin, Beaver, Beryl McNabb, Nichols, James, Washington, Wendy Ligas, and Alex Yones) file grievances alleging that this refusal to offer them employment violated the contract because it was not done pursuant to their seniority. In its response to these grievances, the Respondent stated that at the time that it made its hiring decisions, it was not bound by the seniority provisions of the WSI contract with the Union, and that as the grievants are not employed by the Respondent, they have no legal standing or contractual right to bring the grievances against the Respondent. By letter to Anderson dated September 15, Minton wrote:

> In order to evaluate the merits of these grievances Local 957 requests the following be produced by the Company:
>
> 1. A copy of the Scope of Work document used by the Company to submit its bid;
>
> 2. A copy of the Company's proposal to the Government to perform the work covered by the Scope of Work document;
>
> 3. A copy of all information, if any, provided to the Company by the prior employer that relates in any way to the job performance of the bargaining unit employees of the prior employer, personnel files of the bargaining unit employees of the prior employer and any other information or documents, including electronic documents, received by the Company from the prior employer that relates in any way to the bargaining unit employees of the prior employer.
>
> 4. All correspondence, including electronic correspondence between any representative and/or employee of the Company and any representative, employee and/or former employee of the prior employer that relates in any way to the bargaining unit employees of the prior employer.
>
> 5. All correspondence between and /or among representatives and/or employees of the Company that in any way relate to the bargaining unit employees of the prior employer and/or relate to the employment decision made by the Company of bargaining unit employees of the prior employer.

Minton testified that this information was relevant to the Union in processing these grievances on behalf of these employees. Gustafson responded to this request by letter dated October 15, stating, inter alia:

> DMS made and implemented a decision not to hire these applicants prior to the time DMS agreed to be bound by the terms of the CBA. The request for information therefore relates to persons who are not and never have been bargaining unit employees of DMS. Such a request for information is not presumptively relevant.

Additionally, Gustafson alleged that Items 1 and 2 were confidential matters concerning its bid to the Federal Government.

III. ANALYSIS

It is initially alleged that the Respondent failed to utilize seniority when laying off unit employees and when assigning hours of work to unit employees, in violation of Section 8(a)(1)(5) of the Act. Actually, the alleged violation is the failure to utilize seniority in choosing which of the WSI employees it would hire. The Union contract with WSI provides that layoffs and the assignment of "available work" will be determined on the basis of classification seniority. The Respondent did not select employees for employment based upon seniority. The issue is whether it was obligated to do so.

As the Respondent, in its Answer, admits that it is a successor to WSI, the real issue is whether it is a "perfectly clear" successor to WSI as is also alleged in the complaint. In NLRB v. Burns Intl. Security Services, 406 U.S. 272, 294–295 (1972), the Court stated:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

In *Spruce Up Corp.*,[3] 209 NLRB 194, 195 (1974), the Board stated that this "perfectly clear" caveat established by Burns should

> [B]e restricted to circumstances in which the new employer has either actively or, by tacit interference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clear-

[3] Counsel for the General Counsel, in his Brief, requests that I overturn the ruling in *Spruce Up,* supra. That issue is for the Board, not me, to determine.

> ly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

See also *Banknote Corp. of America*, 315 NLRB 1041 (1994); *Planned Building Services, Inc.*, 318 NLRB 1049 (1995); and *Hilton's Environmental, Inc.*, 320 NLRB 437 (1995).

After it was awarded the contract, the Respondent requested WSI to distribute employment applications to, and arrange a time for interviews for, all employees who were interested in continuing their employment with the Respondent at the Base and on August 6, 7, and 8 the Respondent interviewed all of these incumbent applicants. At the conclusion of these interviews, Sook, Gustafson, and Watson told the applicants that they would be hearing from the Respondent shortly as to whether they would be offered employment. Some of those interviewed were at the top of the seniority lists and a rejection of their applicant would violate the WSI contract's seniority provision. Washington, at her interview, asked if they would be hiring by seniority; she testified that he responded that they didn't know at the time, but that they would be looking at qualifications. Gustafson testified that he told her that seniority would not be used because they were hiring fewer people than had been employed by WSI. Although I do not believe that it makes much difference in the outcome of this matter, I would credit Gustafson; the emails between he and Minton regarding Minton's insistence on him signing the interim agreement establishes that he was knowledgeable about the law and it would be reasonable and prudent for him to tell applicants, who asked, that they would not be hiring by seniority. For the same reason, I would credit Gustafson's testimony that, when asked, he told Minton that they would not be hiring by seniority. Clearly, he would not try to hide this fact from Minton; he would have no reason to do so. The two requirements of "perfectly clear" are missing: the Respondent told Minton that they would not be hiring all the employees and told the applicants that they would hear shortly from the Respondent as to whether they would be hired. It was therefore not "perfectly clear" that the Respondent intended to hire all of the WSI unit employees as required by Burns; in fact, they sent employment offer letters to two-thirds of the WSI employees. In addition, Gustafson told Minton and Washington that seniority would not be used in deciding whom to employ, and told the applicants that they would hear from the company shortly as to whether they would be offered employment, which, at the least, is an inference to the applicants that, at least at that time, it was not going to adopt the terms and conditions of the WSI contract. I therefore find that the Respondent is not a perfectly clear successor and that the Respondent did not violate Section 8(a)(1)(5) of the Act by its refusal to use seniority in determining whom to employ in August. *Paragon Systems, Inc.*, 362 NLRB No. 166 (2015).

It is further alleged that by failing and refusing to provide the Union with the information that it requested on about September 15, the Respondent violated Section 8(a)(1)(5) of the Act. The requested information relates to the Respondent's bid submitted to the government, and other information that may have been used by the Respondent in determining which employees it would hire. Shortly before requesting this information, the Union had filed grievances on behalf of the employees alleging that the Respondent violated the contract by selecting employees for hire in violation of the contract's seniority provisions. Respondent's principal reason for not providing the Union with this information, as testified to by Gustafson, is: "I did not consider them part of the bargaining unit because they were never hired or employed . . . by Data Monitor."

Section 8(a)(1)(5) of the Act requires an employer to furnish the union representing its employees with information that is relevant to the union in the performance of its collective-bargaining responsibilities, either in the administration of the existing contract, or in formulating proposals for a new contract. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). Information about terms and conditions of employment of employees in the bargaining unit is presumptively relevant and necessary and must be produced. However, when the union's request concerns information about non-unit employees or operations, there is no such presumption of relevancy to the union's representation status, and the union has the burden of establishing the relevance of the requested information. *Ohio Power Co.*, 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976); *Duquesne Light Co.*, 306 NLRB 1042, 1043 (1992). A union satisfies this burden by demonstrating a reasonable belief supported by objective evidence for requesting the information, *Knappton Maritime Corp.*, 292 NLRB 236, 238–239 (1988), and potential or probable relevance is sufficient to give rise to the employer's obligation to furnish the information. *Shoppers Food Warehouse Corp.*, 315 NLRB 257, 258 (1994).

I find that the requested information is clearly relevant to the Union in processing the grievances and that the Respondent's defense that they are not obligated to provide the information because they never employed the individuals involved has no merit. This defense "begs the question" as the issue alleges that the failure to employ them violates the seniority provisions of the contract. It would be similar to a union arbitrating the discharge of an employee and the employer defending that there is no requirement to provide the information because he/she is no longer employed by the company. I therefore find that by refusing to provide the Union with the information requested on about September 15, the Respondent violated Section 8(a)(1)(5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1)(5) of the Act by refusing to furnish the Union with the information that it requested on about September 15, 2014, which was information relevant to the Union as the collective-bargaining representative of certain of its employees.
4. It is recommended that the remaining allegations of the complaint be dismissed.

REMEDY

Having found that the Respondent violated the Act by refusing to provide the Union with the information that it requested

on about September 15, 2014, it is recommended that the Respondent be ordered to provide this information to the Union and to post a notice to this effect.

Upon the foregoing findings of fact, conclusions of law and the entire record, I hereby issue the following recommended[4]

ORDER

Data Monitor Systems, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from refusing to provide the Union with the information that it requested on about September 15, 2014, or in any like or related manner interfere with, restrain or coerce its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) In a timely manner, provide the Union with the information that it requested on September 15, 2014.

(b) Within 14 days after service by the Region, post at its facilities at the Wright Patterson Air Force Base in Dayton, Ohio, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that portions of the complaint are dismissed insofar as it alleges violations of the Act not specifically found herein.

Dated, Washington, D.C. January 19, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

Choose not to engage in any of these protected activities

WE WILL NOT refuse to provide Teamsters Local Union No. 97, General Truck Drivers, Warehousemen, Helpers, Sales and Service and Casino Employees ("the Union") with information that is relevant and necessary to it in its role as your bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide the Union with the information that it requested on September 15, 2014.

DATA MONITOR SYSTEMS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09–CA–145040 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."